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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

LOIS FARRELL,

Plaintiff and Respondent,

v.

DONALD R. FARRELL,

Defendant and Appellant.

A125289

(San Francisco City & County  
Super. Ct. No. 291371)

**I.**

**INTRODUCTION**

Appellant Donald Farrell (Donald)<sup>1</sup> seeks to reverse an order of the probate court entered on a verified petition filed by his deceased brother's widow, Lois Farrell (Lois). The petition sought judicial construction of a trust instrument executed by Lois's mother-in-law, Edith Farrell (Edith), during her lifetime, Donald's removal as trustee, and an accounting from Donald for the period of time he administered the trust.

The challenged ruling by the probate court found that Lois had standing to bring the petition because Manuel Farrell (Manuel), Lois's deceased husband, was a trust beneficiary in that he outlived Edith, as required by the terms of the trust. In so ruling, the probate court rejected Donald's argument that the 60-day survivorship requirement in Edith's pour-over will supplemented and was incorporated into the survivorship clause in

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<sup>1</sup> For the reader's convenience, we refer to the parties by their first names, as the parties themselves do in their briefing.

Edith's trust. The court did not rule on whether Donald should be removed as trustee, but ordered Donald to provide a complete accounting.

The principal issue on appeal is whether the probate court properly interpreted the trust instrument by concluding that Manuel's share of the trust assets vested even though he survived Edith by only 33 days. We conclude the trial court properly interpreted the trust instrument; consequently, we affirm.

## II.

### FACTS AND PROCEDURAL HISTORY

Having recently rendered an unpublished appellate opinion in this matter (*Farrell v. Farrell* (March 30, 2009, A122592, Ruvolo, P. J., Reardon, J., Sepulveda, J. (*Farrell I*))), we repeat the facts as set out in that opinion, adding additional facts as necessary.<sup>2</sup>

Edith died on January 29, 2008. During her lifetime, Edith created a revocable inter vivos trust and executed a pour-over will that left all of her estate, including a home in San Francisco, California, in equal shares to her three sons—Donald, Manuel, and Richard Farrell (Richard).<sup>3</sup> Upon Edith's death, Donald became the trustee.

On March 4, 2008, shortly after his mother Edith's death, Manuel died. As already noted, Lois is Manuel's widow and the legal representative of his estate. Manuel's death precipitated a dispute between his brothers and his heirs centering on the question of whether Manuel's interest in Edith's estate terminated upon his death, or whether it passed to his heirs, including his widow Lois.

The issue of heir survivorship is addressed in relevant provisions of the two documents constituting Edith's estate plan, the Edith Rita Farrell Revocable Intervivos

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<sup>2</sup> On July 20, 2009, this court granted Donald's request for judicial notice of the record filed in *Farrell I*. (Ruvolo, P. J.)

<sup>3</sup> A pour-over will operates in conjunction with a decedent's trust. The pour-over will causes any portion of the decedent's estate not already included in the trust to become a trust asset, and to be distributed to the trust beneficiaries on the terms provided by the trust. (See, e.g., *Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035, disapproved on other grounds in *Bernard v. Foley* (2006) 39 Cal.4th 794, 816, fn. 14.)

Trust and the Last Will and Testament of Edith Rita Farrell. The most recent version of Section 2.04 of Edith's trust provides, in pertinent part, "After the death of Trustor . . . all of the Trust Estate then in the possession of the Trustee shall be held, administered and finally distributed by the Trustee to Trustor's sons, Manuel Farrell, Jr., Richard Farrell, and Donald Farrell in equal shares, share and share alike, or to the survivor. In the event the Trustor's sons do not survive the Trustor, the trust estate shall be distributed to Michelle Porep . . . ."

On the same day that Edith executed the foregoing trust provision, she also executed a pour-over will. Section 5.4 of Edith's will provides, in pertinent part, "For the purposes of this will, a beneficiary shall not be deemed to have survived me if that beneficiary dies within sixty (60) days after my death." As noted, Manuel survived Edith by approximately 33 days.

Both Lois and Donald retained counsel. In a letter to Donald's attorney dated April 10, 2008, Lois's counsel quoted language from the trust and maintained that because "Manuel Farrell, Jr., died subsequent to Edith Rita Farrell, he is a beneficiary and his estate is entitled to a distribution from the Trust. . . ." Donald's attorney responded on April 16, 2008, asserting that Manuel's estate was entitled to nothing because he did not survive his mother for 60 days, and because he did not survive the distribution of the trust.

On June 19, 2008, Lois filed a verified petition under Probate Code section 17200<sup>4</sup> seeking (1) declaratory relief confirming that Manuel's estate is a trust beneficiary; (2) removal of Donald as trustee and replacement by a professional trustee; and (3) an accounting from Donald for the period of time he administered the trust.

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<sup>4</sup> Under Probate Code section 17200, "[a] trust beneficiary may petition the probate court regarding matters affecting the internal affairs of a trust, unless the trust instrument expressly withholds authority to proceed. Among other powers, the court has jurisdiction (1) to interpret the terms of the trust, (2) to determine the existence or nonexistence of any power, privilege, duty or right, (3) to instruct the trustee, and (4) to compel the trustee to report information about the trust or account to the beneficiary. [Citations.]" (*Johnson v. Kotyck* (1999) 76 Cal.App.4th 83, 86.)

Donald did not answer the petition. Instead he filed a demurrer raising the question of whether, since Manuel failed to meet the 60-day survivorship clause in Edith's will, Lois lacked standing to file the petition. He also filed a motion to strike, claiming that Lois's petition was a SLAPP suit. (See Code Civ. Proc., § 425.16.) The demurrer was overruled and the motion to strike was denied.

Donald filed an appeal. On March 30, 2009, we rendered our opinion in *Farrell I*, concluding "the anti-SLAPP motion was properly denied because Donald has not met his burden of demonstrating that Lois's Probate Code section 17200 petition was a SLAPP suit." (*Farrell I*, p. 1) We noted that Lois's petition sought "to establish Donald's error in failing to acknowledge Lois's and her heirs' entitlement to share in the proceeds of Edith's estate and to rectify his failure to perform his duties with regard to management of the trust, including his duty to make a proper accounting to trust beneficiaries." (*Farrell I*, p. 6.) As such, this court held "the petition filed by Lois under Probate Code section 17200 does not arise from protected free speech or petitioning activity"; consequently, Donald failed to meet his burden of demonstrating Lois's Probate Code section 17200 petition was a SLAPP suit. (*Farrell I*, pp. 5-6.)

With *Farrell I* decided, Lois's Probate Code section 17200 petition was finally heard. After hearing the arguments of counsel on April 27, 2009, the probate court ruled "that Manuel Farrell [is] a beneficiary of the [T]rust. And that his surviving spouse Lois does have standing to bring the petition that is before the Court." Donald was ordered to

prepare an accounting. On May 26, 2009, the court signed a written order to the foregoing effect. This appeal followed.<sup>5</sup>

### III. DISCUSSION

#### A. Court's Authority to Issue the Challenged Order

Donald initially questions the trial court's authority to issue its May 26, 2009 order because: (1) the order was issued a few days before the remittitur in *Farrell I* issued; and (2) the order was issued while Donald had a motion for judgment on the pleadings pending "that squarely addressed the legal issue presented."

We conclude that Donald cannot now assert that the proceedings below were conducted in excess of jurisdiction, because he actively participated in the proceedings and expressly indicated to the court that it had the authority to proceed. When the matter was argued, Donald's counsel stated, "[t]he case is at issue. And you have the pleadings in front of you, and you can make a ruling." (See *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 9 [appearance at hearing and opposition to motion on merits constituted consent to exercise of jurisdiction in excess of court's authority]; *West Coast Constr. Co. v. Oceano Sanitary Dist.* (1971) 17 Cal.App.3d 693, 699 [appellant was estopped to challenge the jurisdictional defect in the proceeding where he participated in the hearing].) Under general civil litigation principles, one who expressly agrees to an action

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<sup>5</sup> This court has jurisdiction to hear this appeal under Code of Civil Procedure section 904.1, subdivision (a)(10), and Probate Code sections 1304, subdivision (a), and 17200, subdivision (b)(4). "An appeal, other than in a limited civil case, . . . may be taken from any of the following: . . . (10) [f]rom an order made appealable by the provisions of the Probate Code or the Family Code." (Code Civ. Proc., § 904.1, subd. (a)(10)). "With respect to a trust, the grant or denial of the following orders is appealable: (a) [a]ny final order under Chapter 3 (commencing with Section 17200) . . . ." (Prob. Code, § 1304, subd. (a)). Section 17200, subdivision (b)(4), provides "[a]scertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument."

at trial may not challenge that action on appeal. (*Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767, 779.)

### **B. Standard of Review**

It is a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) In the trust and estate context, when there is no extrinsic evidence involved, the court's interpretation of a written trust is reviewed de novo. (*Estate of Powell* (2000) 83 Cal-App.4th 1434, 1439-1440; *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73.) As no extrinsic evidence was involved in this case, the parties agree that de novo review is required.

### **C. Is Manuel's Estate Entitled to a Distributive Share of the Trust?**

It is true that if a trust beneficiary fails to survive the trustor or does not survive until some future time required by the trust, that beneficiary does not take under the trust. (Prob. Code, § 21109, subd. (a).) However, Probate Code section 11801, subdivision (a) indicates that, absent a contrary intention, "the share in a decedent's estate of a beneficiary who survives the decedent but who dies before distribution shall be distributed under this chapter with the same effect as though the distribution were made to the beneficiary while living." That beneficiary's share "shall be made to the personal representative of the estate of the beneficiary for the purpose of administration in the estate of the beneficiary." (Prob. Code, § 11802, subd. (a).)

In applying these legal principles, Lois argues that because Manuel was living at the time of Edith's death, the trust must be distributed pursuant to its terms; and Manuel's estate is entitled to his distributive share. She insists this result is consistent with the trust's plain, unambiguous language requiring the distribution of trust assets to the trustor's surviving beneficiaries immediately upon the trustor's death.

In opposition, Donald argues that "Lois is not entitled to a distribution of trust assets because Manuel failed to meet the 60-day survivorship requirement in Edith's pour-over will, an integral part of Edith's integrated estate plan . . . ." However, Lois points out that "[n]o assets have poured over from the Will to the Trust. The real

property was transferred into the Trust at the time of its creation.” Consequently, Lois “claims only under the Trust and not under the pour-over Will.”

“The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.” (Prob. Code, § 21102, subd. (a).) In construing a trust instrument, the intent of a trustor prevails and it must be ascertained from the whole of the trust instrument, not just separate parts of it. (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 453.) Significantly, “there is a strong preference for vested interests, and gifts contingent upon survival to a fixed point in time are not presumed to reflect testamentary intent unless that intent is clearly expressed in the testamentary document. [Citation.]” (*Estate of Logan* (1978) 84 Cal.App.3d 717, 726.)

The distribution provision of the trust at issue includes a dispositive sentence that “[a]fter the death of Trustor . . . all of the Trust Estate then in the possession of the Trustee shall be held, administered and finally distributed by the Trustee to Trustor’s sons, Manuel Farrell, Jr., Richard Farrell, and Donald Farrell in equal shares, share and share alike, or to the survivor.” Following this mandate, the trust provides further that “[i]n the event the Trustor’s sons do not survive the Trustor, the Trust Estate shall be distributed to Michelle Porep . . . .” The intent that the trust assets were to be distributed immediately upon Edith’s death, is also shown by the operative provision that “[a]fter Trustor’s death, the Trust Estate shall be distributed as provided herein.”

We agree with Lois that the trust document, taken as a whole, evinces Edith’s intent that the trust assets pass immediately upon her death to all her surviving beneficiaries. Further, the trust provides that if any of the named beneficiaries do not survive Edith, then the deceased beneficiary’s interest will immediately pass to the surviving trust beneficiaries. Thus, the language of the trust indicates Edith’s intent to impose the simple condition of survivorship, and because Manuel survived his mother, his interest in the trust vested upon Edith’s death. (See *Estate of Newman* (1964) 230 Cal.App.2d 158, 163.)

There is no express language in the trust to which Donald can point indicating Edith’s intent that her named beneficiaries should forfeit their interest in the trust

proceeds if they fail to survive her by 60 days. The only language Donald points to in support of his argument is contained in Edith's pour-over will, which provides: "*For the purposes of this will*, a beneficiary shall not be deemed to have survived me if that beneficiary dies within sixty (60) days after my death." (Italics added.) Donald claims "the 60-day survivorship clause in Edith's pour-over will, an integral part of her estate plan[,] evinced her intent that any [trust] beneficiary needed to survive her by 60 days to receive a distribution."

However, even a cursory reading of the quoted language reveals that the "sixty (60) days after my death" survivorship phrase is not intended to govern the distribution plan for both the will and the trust. If they were, Edith would not have needed to add the phrase "[f]or purposes of this will."<sup>6</sup> While Donald argues that the distribution provision included in Edith's will and the distribution provision included in her trust need to be interpreted as one integrated estate plan, the critical parts in question, i.e., the distribution provisions in the will and the trust, are clearly not integrated as they are specifically crafted to vary from one another. The wording of Edith's trust is simple and clear that the trust estate should be distributed to her living beneficiaries immediately upon her death. It was also Edith's clear intent that any property which passed to the trust as a result of her pour-over will should be distributed according to the terms of the trust. Edith's will directs that, upon her death, the trustee of her trust "shall add the property disposed of under this will to the trust principal and hold, administer, and distribute the property *in accordance with the provisions of that trust agreement*, including any amendments of that trust agreement that have been made before or after execution of this will." (Italics added.)

Therefore, after reviewing this matter de novo, we conclude the probate court correctly resolved the questions regarding the construction of Edith's trust and pour-over

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<sup>6</sup> Apparently, Donald doesn't seem to know what to do with the phrase "[f]or purposes of this will," since it is in clear contradiction to his overall argument. He simply ignores it, rather than considering the 60-day survivorship requirement in its whole context.



will. We also agree with the trial court’s determination that “Manuel Farrell is a beneficiary of the trust of Edith Rita Farrell, having survived the settlor as required by the terms of the trust instrument,” and that Lois “has standing to bring the petition as she is the successor in interest to Manuel Farrell.” We also agree that Donald was under a duty to account.

**IV.**  
**DISPOSITION**

The order is affirmed. Costs on appeal are awarded to Lois.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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SEPULVEDA, J.